Court File No. T- 336-19

FEDERAL COURT OF CANADA

BETWEEN:

TREATY LAND ENTITLEMENT COMMITTEE INC. ON ITS OWN BEHALF, AND AS REPRESENTATIVE OF THE TREATY LAND ENTITLEMENT FIRST NATIONS OF BARREN LANDS FIRST NATION, BUFFALO POINT FIRST NATION, GOD'S LAKE FIRST NATION, MANTO SIPI CREE NATION, NISICHAWAYASIHK CREE NATION, NORTHLANDS DENE FIRST NATION, NORWAY HOUSE CREE NATION, OPASKWAYAK CREE NATION, ROLLING RIVER FIRST NATION, SAPOTAWEYAK CREE NATION, WAR LAKE FIRST NATION and WUSKWI SIPIHK FIRST NATION,

Applicants,

-and -

HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA now described as THE MINISTER OF INDIGENOUS SERVICES CANADA (HEREINAFTER "CANADA"),

Respondent.

NOTICE OF APPLICATION

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TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Winnipeg, Manitoba.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

FEB 20 2019

ORIGINAL SIGNED BY
SARAH MANTLER
À SIGNÉ L'ORIGINAL

Issued by: _____ (Registry Officer)

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TO: **REGISTRY**
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AND TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

AND TO: **THE HONOURABLE SEAMUS O'REGAN, MINISTER OF INDIGENOUS SERVICES CANADA**
c/o Department of Justice
301-310 Broadway
Winnipeg, Manitoba
R3C 0S6

APPLICATION

THE APPLICANTS MAKE APPLICATION FOR:

1. Registration of an arbitral award issued by the Honourable Arbitrator Sherri Walsh on March 19, 2018 as against Her Majesty the Queen in Right of the Government of Canada as represented by the Minister of Indigenous and Northern Affairs Canada now described as the Minister of Indigenous Services Canada (hereinafter "**Canada**").

2. A declaration that the Releases and Indemnities executed by each of the Entitlement First Nation applicants (the "**EFN**"s) in favour of Canada, pursuant to the 1997 Manitoba Framework Agreement (the **MFA**), are void or ineffective, and that **Canada** is barred from relying on those Releases and Indemnities, as subsection 25.01 X.05 (3) of the **MFA** provides for.

3. The costs of the Applicants on a solicitor and own client basis; and

4. Such other and further relief as this Honourable Court may deem just.

THE GROUNDS FOR THE APPLICATION ARE:

- **Statutory provisions**

1. The *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50.

2. The *Federal Courts Act*, RSC 1985, c F-7, including ss. 3, 17.

3. The *Federal Court Rules* including Rules 3, 4, 114, 300(f), 324, 326, 327.

4. The *Commercial Arbitration Act*, R.S.C., 1985, c. 17 (2nd Supp.), and the *Commercial Arbitration Code*, especially articles 35 and 36.

- ***Executive Summary of grounds.***

5. The arbitral award of March 19, 2018 that the applicants seek to have registered and enforced against **Canada**, is a judgment to which Rules 326 and 327 of the *Federal Court Rules* apply, and the proceedings herein involve relief against the Crown in accordance with section 17 of the *Federal Courts Act.*

6. Section 36 of the *Commercial Arbitration Act* does not preclude registration of the judgment.

7. The respondent, **Canada**, appeared before the arbitral tribunal that granted the judgment.

8. The respondent in this application, **Canada**, is the Crown, and resides in all parts of **Canada** for jurisdictional purposes.

9. The March 19, 2018 arbitral award determined that **Canada** had committed "**Event(s) of Default**", as that term is defined in a 1997 treaty implementation agreement, which agreement was entered into among **Canada**, Manitoba, and the Treaty Land Entitlement Committee Inc. (**TLEC**), and is called the Manitoba Framework Agreement (the "**MFA**").

10. Pursuant to the **MFA**, and in particular subsections 25.01(X.05) (1)-(3), upon the arbitrator's finding that Canada had committed an "**Event of Default**", the Releases and Indemnities that each applicant Entitlement First Nation (**EFN**) signed in favour of **Canada** became suspended, and **Canada** became unable to rely upon those Releases and Indemnities .

11. In accordance with sub-section 25.01(X.05) (4) the **MFA**, **Canada** had 180 days after the arbitral finding to remedy the **Events of Default**, failing which, and pursuant to that subsection, the applicants have the right to ask the Court to issue a declaration that the Releases and Indemnities are void or ineffective, and that **Canada** is barred from relying on them.

12. To the date of the filing of this application, **Canada**'s the **Events of Default** remain un-remedied, and **Canada** refuses to stop engaging in the conduct that gave rise to the finding that it had committed **Events of Default.**

13. The applicant First Nations seek declarations that the Releases and Indemnities are void or ineffective, and that **Canada** is barred from relying on the Releases and Indemnities.

- ***More detailed grounds.***

14. During the period 1871 to 1910, the Applicant First Nation **EFN**s entered into or adhered to various Treaties, particularly Treaties No. 1, 3, 4, 5, 6 and 10, with **Canada**.

15. Among other matters, each of those numbered treaties provided that **Canada** would set apart lands as reserve for the exclusive use and benefit of the Applicant First Nation **EFN**s, with the quantum of the treaty land entitlement being based on a *per capita* formula as identified in each of the treaties.

16. The treaty land entitlement promises made to the Applicant **EFN** Bands were still outstanding when, in 1997, an umbrella framework agreement, called the Manitoba Framework Agreement (the "**MFA**") was entered into among **Canada**, Manitoba and the Treaty Land Entitlement Committee Inc. (**TLEC**) on behalf of the **EFN**'s.

17. The **MFA**, while not a treaty itself, is a treaty implementation agreement. Included among its terms are terms that expressly identify the processes and procedures that **Canada** is obliged to follow in fulfilling its *per capita* Treaty land entitlement commitments under the Treaties.

18. The honour of the Crown is pledged to the fulfilment of the treaty promises, and the honour of the Crown requires the Crown, including (**Canada**) to diligently and purposefully implement the long outstanding *per capita* treaty land entitlement promises in accordance with the processes and procedures identified in the **MFA**.

19. As part of the **MFA**, and in consideration of the Crown's commitments in the **MFA**, including the commitment to adhere to the processes and procedures identified in the **MFA** to be used in having lands set apart as Reserve, each Applicant **EFN** was obliged to and did execute a conditional Release and Indemnity (which terms are defined in the **MFA**), in **Canada**'s favour.

20. The terms of the conditional Release and Indemnity executed in favour of **Canada** by each Applicant **EFN** is set out in paragraphs 25 and 26 of the **MFA**.

21. The conditional nature of each Release and Indemnity is explained in subsection 25.01 X.05 (3) of the **MFA.** That subsection reads that:

> In the event Canada has committed an Event of Default and that Event of Default continues for a period of 180 days, the Entitlement First Nation shall be entitled to request a declaration before a court of competent jurisdiction that the Release and Indemnity is void or ineffective in whole or in part and that Canada is barred from relying on the Release and Indemnity.

22. Commencing in 2012, and continuing in an unabated fashion including to the present day, **Canada** has conducted itself contrary to the terms of the **MFA** and has materially failed to comply with its obligations under the **MFA,** and has been committing "**Events of Default**". (An "**Event of Default"** is a defined term in the **MFA).**

23. **Canada,** however, commencing in 2012 denied it was materially failing to comply with its obligations under the **MFA,** and denied that it was committing any **Events of Default.**

24. During August and September 2017, the dispute concerning Canada's conduct, and whether they had committed **Events of Default,** proceeded to binding arbitration under the **MFA.**

25. On March 19, 2018, the adjudicator in binding arbitration issued an award in which it was found that **Canada** had committed a number of "**Events of Default**", and that such defaults were part of a pattern of failures pursuant to section 36.02(b) of the **MFA.**

26. Section 36.02(b) of the *MFA* reads in part:

> 36.02 Matters Constituting Events of Default
>
> The following constitute Events of Default by a party or an Entitlement First Nation:
>
> a. .....
>
> b. an Adjudicator in binding arbitration has determined:

i. that a party or an Entitlement First Nation has, repeatedly and in a manner which clearly establishes a pattern, materially failed to comply with its obligations under this Agreement or any Treaty Entitlement Agreement.

27. The March 19, 2018 arbitral award was not challenged or appealed in any way by any party.

28. Following the finding that Canada had committed **Events of Default**, and pursuant to section 25.01 X.05 (1) of the **MFA**, the Releases and Indemnities at issue in this proceeding were immediately suspended for a period of 180 days (6 months).

29. During the suspension period of 180 days, **Canada** had the option to take steps to remedy the **Events of Default** and to secure a determination that it had remedied those **Events of Default.** (Only upon remedying the **Events of Default** can Canada once again benefit from, and rely upon the conditional Releases and Indemnities).

30. Where the **Event of Default** committed is one identified in 36.02(b), (as it was in this case), then pursuant to section 25.01 X.05 (3) of the **MFA**, the default remains un-remedied unless and until either:

a. the Implementation Monitoring Committee (a body that oversees the implementation of the **MFA** as defined in the **MFA**) or;
b. an adjudicator in binding arbitration determines that the party in default has taken reasonable steps to remedy the default.

31. Since the award, neither the Implementation Monitoring Committee, nor an adjudicator in binding arbitration, has determined that **Canada** has taken reasonable steps to remedy the default. (There are no proceedings pending for such determination, no proceedings were ever initiated by **Canada** to seek such a determination, and no such determination has been made).

32. More than 180 days (6 months) have elapsed since March 19, 2018, and the **Events of Default** remain un-remedied.

33. Moreover, notwithstanding the arbitral findings, **Canada** continues to refuse to abide by the processes and procedures it expressly agreed to follow under the **MFA** for the setting apart of land as reserve, and continues to engage in the very conduct that gave rise to the arbitrator's findings that **Canada** had committed **Events of Default**.

34. One of the possible ways to remedy the **Events of Default** is to amend the **MFA**, (which can only be done by agreement), so as to permit **Canada** to engage in the conduct that gave rise to the **Events of Default**.

35. However, until there is any such agreed upon amendments to the **MFA**, it is contrary to the honour of the Crown for **Canada** to ignore the arbitral findings, and to treat their obligations under the **MFA** as though the **MFA** has already been amended to relieve them of their current obligations.

36. The granting of the declaratory relief requested, and the result of the Releases and Indemnities being declared void, will facilitate the extra-judicial negotiations with **Canada** aimed at possibly amending the **MFA.** Success in those negotiations would help secure the constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act*, 1982.

37. The arbitral award should be registered and enforced, and pursuant to section 25.01 X.05 (3) of the **MFA**, a declaration should be issued that the Releases and Indemnities executed in **Canada**'s favour by each applicant **EFN** is void, and that **Canada** is barred from relying on those Releases and Indemnities.

38. Such further and other grounds as counsel may advise and this Honourable Court may allow.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

1. The 1997 Manitoba Framework Agreement;

2. The arbitral reference submitted pursuant to the MFA to adjudicator Sherri Walsh dated May 10, 2017.

3. The award of the honourable Sherri Walsh, Adjudicator, dated March 19, 2018;

4. The affidavit of Chief Nelson Genaille, president of the TLEC, and Chief of the Sapotowayak Cree Nation;

5. Such further and other documentary evidence as counsel may advise and this Honourable Court may allow.

February 19, 2019.

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Harley Schachter
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